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(KOTZE DISMISSAL)
see also Z.A.R. (Greenbook) 1/1898

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WHAT THE POSITION OF THE JUDGES OF THE HIGH COURT OF THE SOUTH AFRICAN REPUBLIC SHOULD BE.

Resolutions adopted by the Members of the Bar of the South African Republic, on 22nd July, 1894.

THE members of the Bar of the South African Republic, being cognisant of the memorials addressed to the Volksraad with reference to certain members of the Bench, and having read the letter addressed by the Bench to His Honour the President of this Republic, are of opinion that their views upon the subject should be placed before the public The members of the Bar are of opinion that for the proper and due administration of justice the following principles should be adopted in regulating the relation of the Judicial power to the Legislative and Executive powers:

1. That the position of Judge of this Republic should be defined by statute to be independent of the Government or any political party, and that this principle should be kept in view in every legislative act regarding the Bench.

Upon this principle depends the liberty of the subject, the confidence of the people in the integrity of the Bench, and the safety of the Republic.

2. To secure the independence of the Bench the appointment of a Judge must be for life or during good behaviour.

There cannot be liberty unless the Judicial power be separated from the Legislative and Executive powers, and the judicial power cannot be separated from the Legislative and Executive powers unless the Judges have nothing to fear either from the Legislature or the Executive. As long as their position is subjected to the possible threats of the Executive power or the passions of the Legislature, they cannot be said to be separated from these respective powers, and their position is one of dependence and not of independence.

3. As a Judge can be removed for bad behaviour, there must be some body to judge whether a member of the Judiciary has, or has not, been guilty of bad behaviour.

In conformity with the principles of independence and inviolability, this body must be such that it is presumably beyond the influence of the Government or of any political party. This body should, therefore, be composed of certain members of the Legislature, chosen by ballot, and certain of the Judges against whom no complaints are formulated. This will secure an independent tribunal, for the members of the Legislature are chosen by ballot, and so party feeling is avoided, and the members of the Bench are upon the first two principles independent.

4. No complaint against any Judge shall go to this body unless a proper charge is formulated by an inhabitant of this Republic with the accuracy required for an indictment, and unless this charge is introduced to the Volksraad either by the Government or by a member of the Raad.
5. That the procedure before this body shall be as formal and as solemn as a criminal trial before the High Court.
6. If the body mentioned in Clause 3 should arrive at a decision to suspend or dismiss a Judge, then such decision will only be final if, after report made by them to the Volksraad, that body approves of the decision.
7. That the salary of the Judges be fixed by statute. "It is well known that a power over a man's subsistence amounts to a power over his will." This is based upon human experience. The unrestrained power of the Legislature summarily to curtail or increase a Judge's salary is inconsistent with his independence.

Unless the above principles are adopted the Judges may become subservient to the Government, or to any political party, or to influential individuals in the State, or they may be subjected to indignities which cannot but be detrimental to constitutional government and the welfare of the State.

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PRETORIA, 16TH JUNE, 1894.

His Honour the State President
of the S. A. Republic.

SIR,—

The Judges of the High Court are informed that, in repetition of the course pursued during the past year, petitions have again been presented to the Honourable the First Volksraad, now in session, against certain of their number. The Judges have no official intimation that such petitions exist, although there is no reason to doubt the correctness of their information. They desire, therefore, with all respect, to remind Your Honour of the proceedings of last year, and at the same time to record more exactly their views on the subject.

When, in its session of Friday, the 16th June, 1893, the Volksraad took into consideration a petition praying for an inquiry with reference to the Judges, and when the discussion by the Legislature with regard to that petition was brought to their notice, the Judges deemed it their duty to close the High Court on Saturday, the 17th June, 1893, until such time as the Volksraad had adopted a course which could meet with their approval. A resolution was fortunately passed on the same day by the Legislature which enabled the Court to resume its functions. By thus publicly acting in vindication of their authority, the Judges had hoped that those who had signed the petition would have seen the irregularity of the course adopted by them, viz.:—

(1) By making an improper use of the right of petition.
(2) By placing the Honourable the Volksraad in a difficult dilemma.
(3) By inducing a discussion in the Volksraad which affected the authority and dignity of the Court without any action by the Government in support of the Judiciary.
(4) By creating the possibility of a conflict between the Legislature and the Judiciary of the State.
(5) By endangering the credit and stability of the State.

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The matter did not, however, rest there. Deeply affected by the debate in the Volksraad, and actuated by the conviction that they were discharging their duty, the Judges addressed a letter to Your Honour, the nature of which was carefully weighed by them. The Government acknowledged the receipt of this communication, and after it had been brought to the notice of the profession and the public, the members of the Bench expected that the citizens would perceive that, whenever they have a charge to prefer against one or more of the Judges, the remedy is not to be sought in the mere presenting of petitions. The Legislature cannot entertain petitions of this kind, for the provisions of Article 115 of the revised Grondwet (*anno* 1889) must be maintained. This article is imperative—under its sanction the Judges have been sworn to their duty by Your Honour, and as long as that article of the Constitution remains every one, even the highest authority in the State, must respect its provisions. Had the petitioners requested the Volksraad that effect shall be given to that article, and that the law of which it speaks shall be enacted, they would have acted within the limits of their right, and when once the law was passed they would have been enabled to formulate and proceed with their charges under its provisions. This would at the same time have afforded a Judge, against whom a charge had been specifically brought, the opportunity of defending himself, so that the truth could be satisfactorily ascertained. Had such a course been adopted, its furtherance would have received the hearty co-operation of the Judges. In their former letter the Judges pointed out the necessity for passing such a law as contemplated by Article 115; and in the new draft of the revised Grondwet, which has been published in the *Gazette* for the information of the people, provision in the desired direction has, with the assistance and approval of the Judges, been made. Assuming that the Judges have been correctly informed, the question arises: What reason can there be for the repetition of the thoughtless proceeding of last year? In the interests of the High Court, the Judges consider it behoves them to inquire into the cause. They think it possible that the urgent reasons which compelled them to close the High Court on Saturday, the 17th June, 1893, and to address the letter, already mentioned, to Your Honour have not been properly understood by the people of the South African Republic. In order to remove such misunderstanding, the Judges deem it necessary to set forth their views more definitely, and beg you—amid the many important duties of State in which you are engaged—to grant them, for a moment, your attention. The Judges consider

that they may the more readily address you, fortified as they are by the conviction that Your Honour likewise appreciates the position of the High Court as one of the pillars of the State, and that you are deeply conscious of the fact that if the independence of the High Court is violated and its existence jeopardised, the independence of the Republic will receive a serious, if not irrecoverable, blow. The Judges appeal to your kindly consideration, in case you might deem this communication somewhat lengthy, or think that they are reminding you of matters patent to all reflecting men. They, however, approach you in order, through you, to approach the people, and can only re-affirm that they are actuated solely by a deep sense of duty to the State. For the sake of clearness the Judges have formulated their views in the shape of the following declaration:—

Chapter I.

Province of the Judge.

The Judges think it necessary to declare what they deem to be their position and duty. If it be thought that they are mistaken in their view, it will be desirable to point out their error by reference to constitutional law and usage. If, however, the Judges are correct in their opinion, they desire that their views shall become as widely known as can be.

It is of course possible, and has indeed often happened, that public opinion, from a partial standpoint, discusses not merely the acts of the Judges, but also their motives. The bitter fruit of this will be, as it ever has been, want of confidence with its baneful results. The province of the Judge is not confined to the mere exercise of jurisdiction. If the Judge is to perform his duty properly, he will in the first place be careful to preserve his individuality and independence over against the Head of the State, who appointed him, and through whose intervention he has been called to discharge his high trust *in the name of the people of the South African Republic.* No fear, nor hope of gain, must influence him when judging of the acts and obligations of suitors, or of the intention of the Legislature. Against the suitors he must uphold the dignity of his office. His conduct must be in strict conformity with the precepts of morality and law, and his manner towards litigants courteous though not familiar. He should not, however, permit their claims to his courtesy and consideration to be turned into a means of their

not yielding to the public administration of justice the duty and respect, which are its due. If, for instance, it be the conviction of the Judge that a witness is misconducting himself, either by his manner, or by endeavouring through his evidence to mislead the Court, it will be the clear duty of the Judge in open court to point out to such an one, without respect of person, the impropriety and criminality of his conduct. The Judge must keep within his province, and guard himself against overstepping the limits of his authority. He must display the necessary firmness, and not allow any undue influence to be exercised over his mind, whether by the prompting of high-placed individuals, the wealth and position of litigants, the threats of political party, or the expression of public opinion. He must conform to the laws of the land, and respect the rights of those who appeal to his authority. The dignity of the Judge consists in his complete independence of every power, that can exert influence over his judgment, which should be regulated in accordance with what conscience dictates, and the law requires. While the Judge should steadfastly resist every encroachment on his jurisdiction, he must carefully avoid travelling beyond the limits of his authority.

Chapter II.

Of the Means to ensure the due Discharge of the Judicial Duty.

In conformity with the practice existing in all civilised countries, the *Grondwet* of the South African Republic has found a safeguard for the independence of the Judges in their appointment for life. A sense of diffidence forbids the Judges to enlarge upon the care which this provision of the Constitution casts upon the Government in the selection to the appointment of Judge. When, however, a Judge has been appointed, and his appointment has been confirmed by the Volksraad, his position (subject to what the Judges will presently observe on the matter) must be, and continue, unassailable. This was properly understood by the Volksraad in its Resolution of 17th June, 1893. Art. 370. The Legislature thereby very wisely prevented the existence of any doubt with regard to the care observed in the appointment of the Judges, and in the confirmation of such appoint-

ment. It was by the adoption of such a course alone that the Legislature made it possible for the Judges to continue to discharge their duty.

What independence can be expected from a Judge, who is always considering whether he may not be giving offence to the Government, that appointed him, or to certain burghers of the State, which he has the honour to serve? What man of self-respect and culture will consent to fill an office, which involves the possibility of his being placed in the dilemma of having to choose between the dictates of his conscience, and the risk of loss of his appointment? The inviolability of the judicial position, however, extends further. The office must be fixed and not subject to change. When the authority and dignity of the judiciary can for the moment be increased or lessened by the other high Departments of State, it is clear that pressure can be put upon the Judges to carry out the will of such other high powers. The mere possibility of such a proceeding is a menace to the judicial office.

The position of Judge embraces a twofold advantage. First of all there is the moral advantage. It is indeed a privilege of the office that the confidence reposed in the occupants of the Bench and the responsibility, which it entails, entitle them to distinction and respect. Until the discussion of last session in the Volksraad, the Judges of the Republic have had no ground for complaint in this direction. They pass by in silence the injury done them on that occasion, but they desire to impress upon Your Honour the injury thereby caused to the Bench and the State. When in the council of the representatives of the people, a want of confidence in the Highest Court of Justice in the Republic is expressed—be it only by one single member of the Legislature—the fact directly affects the welfare of every citizen. Shall we stop to ask what impression must be made on the mind of him, who, as suitor, has lost his case in that Court, when he hears it stated in the Legislature that the Bench is not to be trusted? Will the effect of that not also be a want of confidence in the Government? Is not the judicial office assailed by an attack on the person of the Judge as such?

A second advantage of the judicial position is the salary attached thereto. In order to avoid all appearance of personal interest, the Judges desire not to speak of the insufficiency of their emoluments. The truth of this is apparent and well known. They look to Your Honour to take the necessary steps, and content themselves with the reflection that their reliance on you is not misplaced. They wish, nevertheless, to draw your attention to the fact that the manner in which the salaries of the Judges are annually placed

on the estimates and discussed by the Volksraad, directly affects the judicial office. The Judges have noticed, and appreciate it, that the Volksraad has itself seen the importance of this matter, and aims at reform. In all constitutionally governed countries special provision is made with regard to the salaries of the Judges, and should it become necessary to bring about an alteration, the law which fixes the salaries can only be reconsidered in the manner prescribed by the Constitution. The reason for a provision of this kind is obvious. If the salaries of the Judges be liable to an annual discussion, the danger exists that the Judges may year by year seek to obtain the favour of influential members of the Legislature. This danger is prejudicial to the office of Judge, and affects and injures the people.

The means, therefore, which enable the Judge properly to discharge his duties, are :—

(*a*) The appointment of the Judges for their lives, and the inviolability of the judicial office.
(*b*) The fixing of their salaries by a special law.
(*c*) The fixing of their salaries at an adequate amount.
(*d*) The recognition of the distinction between the judicial office and the person of the Judge, whenever a Judge has personally misconducted himself.

Chapter III.

Procedure to be adopted where a Charge has been preferred against a Judge.

When speaking in the two foregoing chapters of the inviolability of the judicial office, the Judges do not wish to assert that a member of the Bench, who has been guilty of misconduct, can screen himself by an appeal to such inviolability. The Judge, whose duty it is to administer the law, cannot seek to exalt himself above the law; but the permanence of his office is to him the assurance that as long as he does his duty he cannot forfeit it; and that where he has viloated his duty, he cannot be dismissed, without having first been convicted of misconduct, after having had the fullest opportunity of defending himself. With reference to the case of alleged misconduct on the part of the Judge, *Article* 115 *of the Grondwet* (*anno* 1889) speaks with no uncertain sound. It is to be regretted that the law, referred to

in *Art.* 115 has never been promulgated; and should the absence of this law be felt at the present moment, the Judges would suggest the advisability of the Honourable the First Volksraad without delay approving and adopting the chapter in the new draft of the revised Grondwet, which deals with the judiciary of the Republic, and prescribes the proper mode of procedure to be followed.

The Judges have now completed the task, which duty imposed on them. They hope that after the writing of this letter, it will, with Your Honour's assistance, be clear to the people how they can exercise supervision over the High Court, which it is their right to do. The Judges trust that the people will perceive that by the admission of petitions, which may bring discredit upon the signatories as well as upon the Volksraad and Judiciary, the respect and dignity of the State are impaired; while the signatories fail in their object, and, in the event of the petitions containing anything improper, exposing themselves to censure or other danger.

We have the Honour to be, &c.,

(Signed) J. G. Kotzé,
Chief Justice.

„ B. de Korte,
Senior Puisne Judge.

„ H. A. Ameshoff,
Second Puisne Judge.

„ E. J. P. Jorissen,
Third Puisne Judge.

„ G. T. Morice,
Junior Puisne Judge.

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